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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Application of California-American Water Company (U 210 W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates.	)	Application 12-04-019 (Filed April 23, 2012)

PUBLIC TRUST ALLIANCE RESPONSE TO MOTION TO STRIKE MCWD CONSOLIDATED COMMENT ON PROPOSED SETTLEMENT AGREEMENTS

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I. INTRODUCTION

Pursuant to Rule of Procedure 11.1(e), the Public Trust Alliance ("PTA") submits its response to the Joint Parties' Motion to Strike the Consolidated Comment of Marina Coast Water District ("MCWD") on the proposed settlement agreements regarding brine discharge and return water and related Request for Deferred Hearing on the approval of the proposed settlements. PTA opposes the Motion to Strike on ground that it is overbroad and inconsistent with a just and efficient Commission determination regarding the merits of the proposed settlement agreements.

PTA supports a review of the MCWD comment that secures the greatest possible integrity in the decision-making process. More specifically, we ask the Commission to address the factual and legal issues that MCWD raises in its Comments on their merits.

The Joint Parties seek to strike from MCWD's Consolidated Comment all text that questions the viability of the underlying desalination project that the proposed settlement agreements would help to implement. See Motion to Strike, Section III.A, pp. 4-7; Motion Exhibit A, Joint Parties' Mark-up of MCWD Comment and Request. The Join Parties seek to define this material as "improper" and "irrelevant." Motion, p. 5. We urge the Commission to reject this attempt to sweep a relevant and crucial question under the rug in the guise of "settlement."

II. ARGUMENT

A. RELEVANT RULES OF INTERPRETATION

The Joint Parties note that "Pursuant to Rule 12.2, comments on a settlement agreement 'must specify the portions of the settlement that the party opposes, the legal basis of its opposition, and the factual issues that it contests.'" They go on to posit that "Despite the

transparent requirements of Rule 12.2, MCWD permeates its Comments with ***arguments that have nothing to do with the Settlements***." Motion, p. 5 (emphasis added). The matter that purportedly has "nothing to do with the settlements" is the validity and viability of the underlying project. See Motion, p. 5.

The Joint Parties suggest that "There is nothing in Rule 12.2, or any other Commission rule, that permits a party to use the settlement comment procedure as a platform to voice arguments that are not relevant to the settlements at issue." However, Rule 12.2 is subject to the application of Rule 1.2, which provides that "These rules shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented." 2012 Cal. PUC LEXIS 18, *4. It is more just, speedy, and inexpensive, by far, to address the viability of the project before allowing some of the interested parties to "settle" away the areas of dispute that are headed toward litigation because of a refusal to address them. It would be slow and expensive, indeed, to start again after a reversal of a decision taken here.

The interpretation of the proposed settlements is also affected by the fact that they are disputed settlements. According to the Commission:

> The Commission's policy is that contested settlements should be subject to more scrutiny compared to an all-party settlement. As explained in D.02-01-041:
>
> "In judging the reasonableness of a proposed settlement, we have sometimes inclined to find reasonable a settlement that has the unanimous support of all active parties in the proceeding. ***In contrast, a contested settlement is not entitled to any greater weight or deference merely by virtue of its label as a settlement; it is merely the joint position of the sponsoring parties, and its reasonableness must be thoroughly demonstrated by the record.*** (D.02-01-041, mimeo., at 13.)

> ***Accordingly, for the proposed settlement which is contested, we consider the merits of the objections raised by EPUC, and the substantive merits of the underlying disposition of the issues.***"

2014 Cal. PUC LEXIS 395, 968 (emphasis added). We believe that the points MCWD makes about the necessity for the project and its legal viability fall within the scope of the Commission's stated policy to consider "the substantive merits of the underlying disposition of the issues" in a contested settlement.

As MCWD points out, the settlements tend to assume approval of the full project. See MCWD Consolidated Comment, p. 1. Further, we object to the piecemeal disposition of obstacles to the implementation of the project without addressing the issues that parties including MCWD have raised about whether the project is actually needed in light of changing circumstances and changing patterns of consumption. See, e.g., MCWD Consolidated Comment, pp. 4-7, PTA Opening Brief, pp. 13 – 23.

B. MOTION TO STRIKE IS UNWARRANTED

Cal. Code of Civ. Procedure 436 provides that a court has discretion in whether to strike a nonconforming pleading.

> The court ***may***, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper:
>
> (a) Strike out any irrelevant, false, or improper matter inserted in any pleading.
>
> (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.

(Emphasis added.)

Also instructive on the matter of the Commission's discretion is California Rule of Court 8.204(e)(2) (which addresses briefs filed in California Appellate Courts and is cited as persuasive authority). This rule permits the court strike an entire non-conforming brief, but the court is not required to grant a motion to strike, and has several viable options in responding to a noncompliance, including disregarding any purported noncompliance. Rule 8.204(e)(2)(C).

For state-level cases applying section 8.204(e) (2)(C), see, e.g., *In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039, 1046, fn. 1 ("Although portions of Jon's reply rely on matters outside of the record or are similarly defective, we elect to forego our options to order the brief returned for correction or to strike the brief."); *Critzer* v. *Enos* (2010) 187 Cal.App.4th 1242, 1258, fn. 12 (Court noted that a brief's noncompliance with rules regarding proper citations was substantial, but stated: "We have nonetheless overlooked this noncompliance and have considered the contentions and factual assertions made by the HOA in its brief."). See further (Cal. Supreme Court 2013) *Valdez v. Workers' Comp. Appeals Bd. & Warehouse Demo Services*, 2013 Cal. LEXIS 6976.

The Joint Parties suggest that MCWD's repeats issues addressed in prior briefing. See, e.g., Motion to Strike, pp. 6-7. MCWD is indeed raising issues it has raised before, but it is raising them in a different context. When a subset of interested parties seek to settle among themselves a portion of disputed issues in a case, they are shifting to themselves a portion of the decision-making function normally exercised by the Commission. It seems reasonable to us that MCWD is re-raising issues that go to the heart of the merits of this Application and asking the Commission to address them, on the merits, before its decision-making authority is whittled away, partial settlement by partial settlement.

The Commission has typically used its discretion to disregard or limit the weight accorded comments that merely repeat arguments raised in prior briefing, rather than resorting to striking them. See, e.g., 2000 Cal. PUC LEXIS 323, *51. See also, 1994 Cal. PUC LEXIS 1090, *8, 57 CPUC2d 176 (Cal. P.U.C. 1994): "Those comments which merely reargued the positions of the parties in their previously filed briefs have been accorded no weight. The comments regarding alleged factual, technical, and legal errors are addressed in the appropriate sections of this decision."

However, it appears to us that in resolving motions to strike, the Commission prefers to err on the side of ensuring that the record is full and complete. See 2007 Cal. PUC LEXIS 504, *171-172: ". . . the ALJ concluded that he should deny the motion to strike and follow the Commission's 'preferred practice' of 'admit[ting] the testimony into the record, but then . . . afford[ing] it only so much weight as the presiding officer considers appropriate.'"

The Commission has elected to address and resolve allegations on their merits even when they are alleged to be merely repetitious. See, e.g., 2009 Cal. PUC LEXIS 450, *26-27 (addressing appeal of decision):

> Raw Bandwidth alleges numerous errors in characterizing its complaint, its position, and the record. AT&T California responds that Raw Bandwidth is merely repeating its arguments. ***Where allegations of factual error have merit, this decision has corrected those errors.*** Raw Bandwidth alleges the POD does not properly analyze reasonableness under § 451 and reargues its position on advance notice of the disconnection of DSL Transport Service. The POD properly concluded that ASI's failure to provide advance notice of the disconnection of DSL Transport Service is not unjust or unreasonable, reaffirmed the

> Commission's earlier determination that public policy favors provision of advance notice of the disconnection of DSL Transport Service, and adopted Third Party Notice as the most reasonable option. Raw Bandwidth's allegations of legal error lack merit, and we affirm the decision.

(Emphasis added.)

III. CONCLUSION

For the reasons stated above, the Commission should deny the Joint Parties' Motion to Strike. We suggest that MCWD's Comments and Request are completely relevant and important enough to address on the merits. A full evaluation of MCWD's comments and arguments promotes procedural integrity because it enhances fairness and enables the Commission to base its decision on a complete record.

Signed: August 5, 2016

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